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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LONNIE WILLIAMS,
12 CDCR #T-54378,

13 Plaintiff,

14 vs.
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16 DANIEL PARAMO; R. OLSON;
17 E. MARRERO,

18 Defendants.
19

Civil No. 12cv0113 BTM (RBB)

ORDER:

**(1) DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION; and**

**(2) DENYING DEFENDANTS' EX
PARTE MOTION TO STRIKE AS
MOOT**

[ECF Nos. 31, 32]

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22 **I. Procedural History**

23 Plaintiff is a state prisoner proceeding pro se in this civil rights action filed pursuant to
24 the Civil Rights Act, 42 U.S.C. § 1983.¹ On January 30, 2013, Defendants filed a Motion for
25 Judgment on the Pleadings pursuant to FED.R.CIV.P. 12(c) (ECF No. 24). Defendants argued,
26 in part, that Plaintiff has failed to exhaust her administrative remedies prior to suit as required
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28 ¹ Because Plaintiff uses the title "Ms." and identifies as female, the Court shall refer to Plaintiff as
"she."

1 by 42 U.S.C. § 1997e(a). Accordingly, the Court issued an Order providing Plaintiff notice of
2 Defendants' Motion for Judgment on the Pleadings pursuant to *Wyatt v. Terhune* 315 F.3d 1108
3 (9th Cir. 2003) and set a briefing schedule. (ECF No. 25.) This notice informed Plaintiff that if
4 she wished to oppose the Defendants' Motion, "she should include in her Opposition whatever
5 arguments, evidentiary material, or documents she may have to show that she did, in fact,
6 exhaust all administrative remedies as were available to her prior to filing suit." (*Id.* at 2, citing
7 *Wyatt*, 315 F.3d at 1119-21.)

8 The Court took this Motion under submission on April 5, 2013 after the time had lapsed
9 to file an Opposition. (ECF No. 26). On May 29, 2013, this Court entered an Order granting
10 Defendants' Motion for Judgment on the pleadings. (ECF No. 28). On June 4, 2013, Plaintiff
11 filed a document entitled "Objections to Defenses' Motion to Dismiss." (ECF No. 31.) The
12 Court has construed this to be a Motion brought pursuant to Federal Rules of Civil Procedure
13 60(b). Defendants have filed an "Ex Parte Motion to Strike Plaintiff's Opposition to
14 Defendants' Motion for Judgment on the Pleadings." (ECF No. 32.) Following this, Plaintiff
15 filed a "Motion and Declaration in Support of Her Opposition to Defendants' Motion to
16 Dismiss." (ECF No. 37.)

17 Plaintiff has also filed a Notice of Appeal with the Ninth Circuit Court of Appeals. (ECF
18 No. 33.) The Ninth Circuit Court of Appeals has issued an Order to Show Cause (OSC) why
19 Plaintiff's IFP status should not be revoked in light of the fact that she has had three or more
20 actions dismissed as frivolous or for failure to state a claim. *See Williams v. Paramo, et al.*,
21 Court of Appeals Doc. No. 13-56004. Even though Plaintiff has filed a Notice of Appeal, this
22 Court retains jurisdiction to rule on Plaintiff's Motion. *See* FED.R.APP.P. 4(a)(4); *Miller v.*
23 *Marriott Int'l, Inc.*, 300 F.3d 1061, 1063-64 (9th Cir. 2002).

24 **II. Plaintiff's Motion**

25 **A. Standard of Review**

26 Under Rule 60, a motion for "relief from a final judgment, order or proceeding" may be
27 filed within a "reasonable time," but usually must be filed "no more than a year after the entry
28 of the judgment or order or the date of the proceeding." FED.R.CIV.P. 60(c). Reconsideration

1 under Rule 60 may be granted in the case of: (1) mistake, inadvertence, surprise or excusable
2 neglect; (2) newly discovered evidence; or (3) fraud; or if (4) the judgment is void; (5) the
3 judgment has been satisfied; or (6) for any other reason justifying relief. FED.R.CIV. P. 60(b).

4 **B. Plaintiff's claims**

5 The Court's Order, entered on May 29, 2013, found that Defendants had adequately
6 shown that Plaintiff had failed to exhaust her administrative remedies with regard to all of the
7 claims in her Complaint. (ECF No. 28 at 4.) The Court further found that by failing to even file
8 an Opposition, there was no evidence submitted by Plaintiff to rebut Defendants' showing. (*Id.*
9 at 4.) However, Plaintiff now claims that she was unable to file a timely opposition due to the
10 fact that she was "housed in the Department of Mental Health (DMH) in Vacaville until May
11 of 2013." (ECF No. 37 at 1.) The Court's docket reflects that there was no change of address
12 ever filed by Plaintiff nor was any mail from the Court to Plaintiff returned "undeliverable."
13 Regardless, the Court will now consider Plaintiff's untimely Opposition.

14 In the Motion currently before this Court, Plaintiff maintains that she "attempted" to
15 exhaust her available administrative remedies before filing this action. (ECF No. 31 at 2.)
16 Plaintiff seeks an Order from this Court vacating the judgment in favor of Defendants and
17 finding that "Plaintiff's attempts to exhaust be deemed an exhaustion of administrative
18 remedies." (*Id.* at 3-4.) A review of these two documents submitted by Plaintiff demonstrate
19 a failure to provide any evidentiary support to either vacate the previous judgment or find that
20 she has properly exhausted her administrative remedies. Plaintiff does not provide any
21 documents, let alone specific factual allegations, that would defeat the evidentiary support
22 provided by Defendants in their original moving papers.

23 In sum, a motion for reconsideration cannot be granted merely because Plaintiff is
24 unhappy with the judgment, frustrated by the Court's application of the facts to binding
25 precedent or because she disagrees with the ultimate decision. *See* 11 Charles Alan Wright &
26 Arthur R. Miller *Federal Practice & Procedure* 2d § 2858 (Supp. 2007) (citing *Edwards v.*
27 *Velvac, Inc.*, 19 F.R.D. 504, 507 (D. Wis. 1956)). Plaintiff has failed to provide any factual or
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1 evidentiary support for any basis under Rule 60(b) that would justify vacating the Court's May
2 29, 2013 Order.

3 **III. Conclusion and Order**

4 Accordingly, Plaintiff's Motion brought pursuant to FED.R.CIV.P. 60 [ECF No. 31] is
5 hereby **DENIED**. Defendants' Motion to Strike Plaintiff's late Opposition [ECF No. 32] is
6 **DENIED** as moot.

7 **IT IS SO ORDERED.**

8 DATED: September 3, 2013

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10 BARRY TED MOSKOWITZ, Chief Judge
11 United States District Court
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